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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CLIFTON G. FRIZZELL et al., Plaintiffs and Appellants, v. HEMANTHI GUNATILAKE et al., Defendants and Respondents.	B207973 (Los Angeles County Super. Ct. No. NC050400)

APPEAL from a judgment of the Superior Court of Los Angeles County. Patrick T. Madden, Judge. Affirmed.

Harbin & McCarron, Bruce A. Harbin and Richard H. Coombs, Jr., for Plaintiffs and Appellants.

Forry Law Group and Craig B. Forry for Defendants and Respondents.

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Plaintiffs purchased real property from sellers for approximately $695,000 and accepted title that plaintiffs knew was clouded by a lis pendens filed by defendants. Pursuant to an agreement between plaintiffs and defendants, plaintiffs paid defendants over $300,000 to remove the lis pendens. Thereafter, plaintiffs lost their lawsuit against sellers to abate the purchase price. Plaintiffs then brought the instant action against defendants for damages, asserting promissory estoppel and some common counts. The trial court sustained defendants' demurrer to the first amended complaint (complaint) without leave to amend, and plaintiffs appeal from the judgment. Because the allegations in the complaint fail to establish the element of reasonable reliance, the complaint does not state any viable claim against defendants.

BACKGROUND

Because this matter was resolved on a demurrer to the complaint, we derive the background from the allegations of the complaint and from two matters judicially noticed by the trial court upon defendants' request.[1] (*Groves v. Peterson* (2002) 100 Cal.App.4th 659, 667.) Although we deem true the allegations of facts in the complaint, we do not so deem contentions, deductions, or conclusions of law. (*Gentry v. eBay, Inc*. (2002) 99 Cal.App.4th 816, 824 (*Gentry*).)

In 2003, David Danny was the real estate broker and attorney for prior owners of real property in Long Beach (Property). On behalf of the prior owners, Danny entered into an agreement to sell the Property to Hemanthi and Sarath Gunatilake for $360,000. Jay Dharmasuriya was Gunatilake's real estate broker in the transaction. (The Gunatilakes and Dharmasuriya individually and collectively are referred to as defendants.) Thereafter, David Danny and Deborah Danny (hereinafter Sellers) acquired title to the Property, and on April 14, 2005, Sellers entered into a written agreement with

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[1] Notwithstanding the lack of a specific order granting defendants' request for judicial notice, the trial court referred to the matters at oral argument and plaintiffs never objected to defendants' request. The two matters judicially noticed were an order and a minute order in another action between defendants and other parties, in which the trial court denied a motion to expunge the lis pendens.

plaintiffs Clifton and Marjorie Frizzell whereby plaintiffs agreed to purchase the Property for $695,342, with a close of escrow date of April 29, 2005. Before Sellers entered into the agreement with plaintiffs, Sellers did not disclose that the prior owners of the Property had previously contracted to sell the Property to defendants.

On April 27, 2005, defendants recorded a lis pendens against the Property. David Danny informed plaintiffs of the lis pendens on May 2, 2005. On May 2, 2005, defendants knew about the contractual relationship between Sellers and plaintiffs and intended to disrupt that relationship.

Sometime before May 12, 2005, defendants filed an action against Sellers; plaintiffs were not parties to that action. On May 12, 2005, Sellers filed a motion to expunge the lis pendens; on June 21, 2005, the court denied Seller's motion.

The escrow between plaintiffs and Sellers did not close because Sellers provided no title insurance to plaintiffs; no prorations were agreed to; and no other provisions of the purchase agreement were completed by Sellers. In August 2005, plaintiffs filed an action against Sellers for specific performance of the purchase agreement for the Property. In September 2005, without having the lis pendens expunged or withdrawn, Sellers recorded a grant deed of the Property in favor of plaintiffs. Sellers sent a copy of the grant deed to plaintiffs, with a letter requesting that plaintiffs either accept defective title or reject the conveyance.

Plaintiffs chose to accept less than clear title and exercise their right to abate the purchase price.[2] In order to determine how much of the purchase price to abate, plaintiffs asked the attorney for defendants what amount would be necessary to release the lis pendens from the Property. Defendants asked for payment of $302,792.80, plus a $100,000 deposit in escrow to cover attorney fees in the event that Sellers later sued defendants. In October 2005, plaintiffs paid defendants' demand and defendants

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[2] A buyer has "the right to seek specific performance, to demand conveyance of such title as the seller possessed, and to seek damages for the defect in the title." (*Groobman v. Kirk* (1958) 159 Cal.App.2d 117, 126.)

withdrew the lis pendens. Plaintiffs then deposited the balance of the purchase price in the escrow with Sellers, who continued to demand payment of the entire contract price even though they had not conveyed clear title to the Property. In June 2006, plaintiffs' action against Sellers was tried to the court. Defendants' attorney testified extensively about defendants' claim against the Property, the lis pendens, and how defendants calculated the amount they demanded from plaintiffs. The court ruled that plaintiffs owed the entire contract price to Sellers, finding that plaintiffs should have known that defendants' claim against the Property had no value because their claims were barred by the doctrine of laches. Plaintiffs satisfied the judgment entered against them in favor of Sellers.

According to plaintiffs, "[b]ecause they paid the demand of Defendants to clear title to the . . . Property from notice of a claim that has now been adjudicated unenforceable against Plaintiffs, Plaintiffs have had to pay the sum of $998,134.80 in order to purchase the title that they contracted to purchase for $695,342.00."

In October 2007, plaintiffs filed the instant action against defendants. A cause of action captioned promissory estoppel alleged that in October 2005 defendants orally promised plaintiffs that defendants had a valid and enforceable lien against the Property and that plaintiffs had to pay $302,792.80 to release the lien and provide clear title to the Property; defendants should have expected that plaintiffs would change their position substantially as a result of such promise, and plaintiffs did in fact change their position by paying the amount demanded to obtain clear title to the Property. A cause of action captioned unjust enrichment alleged that in the last two years defendants demanded and received payment from plaintiffs to release a claim or lien against the Property that was not enforceable against plaintiffs and that defendants were unjustly enriched by $302,792.80. A cause of action for money had and received alleged that within the last two years defendants became indebted to plaintiffs for money had and received for the use and benefit of plaintiffs. A cause of action for money paid alleged that within the last two years defendants became indebted to plaintiffs for money paid, laid out, and expended to or for defendants at their special instance and request.

Defendants demurred to the complaint on the following grounds: (1) no viable claim for promissory estoppel was stated because there were no facts establishing an actionable promise or reasonable reliance; (2) no viable claim for unjust enrichment was stated because there were no facts establishing a wrongful act by defendants; (3) no viable claim for money had and received was stated because the complaint showed that defendants performed the bargain with plaintiffs and were not indebted to them; and (4) no viable claim for money paid was stated because the complaint showed that defendants were not obligated to repay the money paid by plaintiffs for the withdrawal of the lis pendens.

In opposition to the demurrer, plaintiffs argued that all of the elements of promissory estoppel were pleaded because defendants "represented the value [of their claim] as $302,792.80. The actual claim of Defendants' against the [plaintiffs] had no value whatsoever." With respect to the unjust enrichment claim, plaintiffs argued that they had adequately pleaded that defendants were unjustly enriched due to coercion or mistake. Plaintiffs also argued that the common counts for money had and received and money paid were viable because the counts alleged that plaintiffs paid money to defendants as a result of mistake, fraud, coercion, and pursuant to a contract after the failure of consideration or defendants' breach.

After a hearing, the court sustained defendants' demurrer without leave to amend. Plaintiffs appealed from the judgment of dismissal.

DISCUSSION

"The elements of a promissory estoppel claim are '(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.' [Citation.]" (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901.) "The law is quite clear that expressions of opinion are not generally treated as representations of fact, and thus are not grounds for a misrepresentation cause of action. [Citations.] Representations of value are opinions." (*Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 308.) A

representation of value is merely the expression of an opinion as to a future event or action by a third party; such statements regarding future events are nonactionable opinions. (*Id.* at p. 310.) Predictions as to future events, or statements as to future action by some third party, constitute opinions and not actionable fraud. (*Borba v. Thomas* (1977) 70 Cal.App.3d 144, 152.) For example, because the fixing of assessed values and tax rates are solely within the power of public officials, whose decisions are not subject to control by property owners, one may not justifiably rely upon representations made by private persons as to such matters. (*Holder v. Home Sav. & Loan Assn*. (1968) 267 Cal.App.2d 91, 106–107.)

As aptly noted by one court: "Although the line of demarcation between expressions of fact and opinion can be unclear at times, this is not such a case." (*Gentry, supra*, 99 Cal.App.4th at p. 835 [statement that an eBay rating is "'worth its weight in gold'" is nonactionable opinion upon which consumer could not reasonably rely].)

As in *Gentry*, this is not a case where it is unclear whether defendants were expressing a fact or an opinion. Plaintiffs asked, and defendants offered, an amount of money plaintiffs would need to pay to defendants to release the lis pendens from the Property. Assuming that defendants were making a representation of the value of their claim, as plaintiffs argue, such representation of value was either an opinion or a prediction of future action by the court. In either case, plaintiffs could not reasonably rely upon such statement as a matter of law under the circumstances alleged here. Thus, the court properly sustained the demurrer to the promissory estoppel cause of action.

In order for a representation to be actionable under an unjust enrichment theory, the representation must be one of fact rather than opinion; predictions of future events or future actions by some third party are deemed to be nonactionable opinions. (*Nibbi Brothers, Inc. v. Home Federal Sav. & Loan Assn*. (1988) 205 Cal.App.3d 1415, 1423 [lenders assurance that developer would make payments was expression of opinion and did not support unjust enrichment claim].) Because the pleading alleges that defendants made no more than an expression of an opinion as to the value of their claim, no viable claim for unjust enrichment was pleaded.

"When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394.) The common counts thus fall with the promissory estoppel cause of action.

Plaintiffs contend that the trial court abused its discretion by denying them an opportunity to amend their complaint to allege that "there was no determination of any enforceable claim by [defendants] against [plaintiffs'] interest in the . . . Property. It is always possible that [defendants] knew of the invalidity (or, at least, the weakness) of their claim against [plaintiffs] and misled [plaintiffs] in their demand for payment." Plaintiffs suggest that they could amend their pleading to state viable claims for misrepresentation or fraud. We disagree. The proposed amendments would not show the element of justifiable reliance, so no viable claims for misrepresentation or fraud would have been stated and leave to amend to assert these theories would have been a futile act. Accordingly, plaintiffs do not establish that there was error in failing to afford them leave to amend.

Plaintiffs complain that defendants' demurrer improperly made factual arguments that were outside the pleadings. Because our review is de novo, we have ignored factual arguments that are not reflected in the complaint or in the matters judicially noticed. (See fn. 1, *ante*.) For all of the foregoing reasons, the trial court properly sustained the demurrer without leave to amend.

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

TUCKER, J.*

* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.